

## The new “right to protection against disinformation” in Portugal

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VOL. 8 N.º 3 DEZEMBRO 2021

[WWW.E-PUBLICA.PT](http://WWW.E-PUBLICA.PT)



COM O APOIO DE:

**FCT** Fundação  
para a Ciência  
e a Tecnologia

ISSN 2183-184x

**THE NEW “RIGHT TO PROTECTION AGAINST DISINFORMATION”  
IN PORTUGAL**

**O NOVO “DIREITO À PROTECÇÃO CONTRA A DESINFORMAÇÃO”  
EM PORTUGAL**

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**Summary:**

1. Introduction
2. The new “right to protection against disinformation” in Portugal
  - 2.1. A right to a decision with no deontic status
  - 2.2. What’s in a right?
    - a) A prohibition of certain kinds of “disinformation”?
    - b) Information correction and balancing reasons
3. Final remarks regarding the legal status of disinformation in Portugal

**Sumário:**

1. Introdução
2. O novo “direito à proteção contra a desinformação” em Portugal
  - 2.1. Um direito a uma decisão sem estatuto deontico
  - 2.2. O que está num direito?
    - a) A proibição de certos tipos de “desinformação”?
    - b) Correção de (des)informação e razões para ponderação
3. Considerações finais sobre o estatuto jurídico da desinformação em Portugal

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**Abstract:** The present paper aims to study the recently enacted and titled “right to protection against disinformation” in Portugal and determine its deontic content. Taking into consideration that the legislator refers also to a new legal definition of disinformation the analysis of the definition will also take place, considering the roles that legal definitions can have in a legal system. The paper takes an analytical approach to the Portuguese norms and system but also strives to frame the legal interpretation of the new right within the European context of measures directed at addressing the problem of disinformation, with special consideration to the EU Digital Services Act (DSA) proposal. It is argued that the new “right to protection against disinformation” is in reality a right to have non-binding decisions by the Media Regulator and that these decisions, although without deontic status, may perform two relevant functions: i) (dis)information correction ii) provide reasons and justification to ulterior judicial decisions concerning the removal or blocking of disinformation.

**Resumo:** O presente trabalho visa estudar o recém-aprovado e intitulado “direito à proteção contra a desinformação” em Portugal e determinar o seu conteúdo deontico. Levando em consideração que o legislador se refere também a uma nova definição legal de desinformação, a análise da definição também será feita, considerando os papéis que as definições legais podem ter num ordenamento jurídico. O artigo adota uma abordagem analítica centrada nas normas jurídicas portuguesas, mas também procura enquadrar a interpretação do novo direito no contexto europeu das medidas dirigidas ao problema da desinformação, com especial atenção à proposta de Regulamento sobre Serviços Digitais da UE (*Digital Services Act – DSA*). Defende-se que o novo “direito à proteção contra a desinformação” é na realidade um direito a decisões não vinculativas por parte da Entidade Reguladora para a Comunicação Social e que essas decisões, embora sem estatuto deontico, podem desempenhar duas funções relevantes: i) correção de (des)informação ii) fornecer razões e justificações para decisões judiciais posteriores relativas à remoção ou bloqueio de desinformação.

**Keywords:** disinformation; balancing; reasons; freedom of expression

**Palavras-chave:** desinformação; ponderação; razões; liberdade de expressão

## 1. Introduction

Boosted by social media, disinformation has become one of the great challenges of our time<sup>2</sup> with several problems being raised. First among them is the very notion of disinformation regarding other similar concepts, such as misinformation or the more mainstream “fake news”<sup>3</sup>. Threatening long established canons for the determination of truth and the degree of certainty as well as the capacity for planning that accompanies it<sup>4</sup>, the notion of disinformation tries to capture the simple but thorny idea that there may be occasions where individuals and institutions will convey information that is not true, not because they made a mistake or are ignorant of the truth but because they want to achieve a certain purpose or goal with the false information they are transmitting. The massification of the commonly called “fake news” has led institutions, both national and international, to face the problem and try to tackle it. Journalists, lawyers, politicians, among others, are currently trying to devise ways of fighting disinformation. One important weapon is conceptual rigour when analysing this phenomenon. From the general but often inadequate use of the expression “fake news”<sup>5</sup>, researchers and institutions have evolved to a more refined toolkit of concepts that tries to distinguish features amongst the straightforward conveyance of false and/or harmful information. Disinformation and misinformation have become standard use both in technical fields of research and institutional jargon<sup>6</sup>.

In 2017, a “Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda” was issued by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. It states as a general principle (1.a) that “States may only impose

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2. See EU COMMISSION, *A multi-dimensional approach to disinformation - Report of the independent High level Group on fake news and online disinformation*, 2018; S. BAUME, V. BOILLET, V. MARTENET, *Misinformation in Referenda*, London, Routledge, 2021; F. NUÑEZ, “Disinformation, Legislation and Freedom of Expression”, *U.C. Irvine Law Review*, Vol. 10, 2, 2020, p. 783-798; C. MARSDEN, T. MEYER, I. BROWN, “Platform values and democratic elections: How can the law regulate digital disinformation?”, *Computer Law & Security Review*, 36, 2020, p. 1-6.

3. See EUROPEAN REGULATORS GROUP FOR AUDIOVISUAL MEDIA SERVICES, *Notions of Disinformation and Related Concepts (ERGA Report)*, 2020, pp. 28 and ff, <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf> (accessed on 22.01.2022).

4. See L. MCINTYRE, *Respecting Truth*, London, Routledge, 2015; idem, *Post-Truth*, Cambridge, MIT Press, 2018

5. See T. MCGONAGLE, «“Fake News”: False fears or real concerns», *Netherlands Quarterly of Human Rights*, Vol. 35(4), 2017, pp. 203-209; C. WARDLE AND H. DERAKHSHAN, *Information Disorder: Toward an interdisciplinary Framework for research and policy making*, CoE, 2017, p. 5.

6. See C. WARDLE AND H. DERAKHSHAN, *Information Disorder: Toward an interdisciplinary Framework for research and policy making*, Council of Europe, 2017; S. BAUME, V. BOILLET, V. MARTENET, *Misinformation*, pp. 2 and ff.

restrictions on the right to freedom of expression in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest” and that “General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished”. In Europe, also in 2017, the Council of Europe has commissioned the report “Information Disorder: Toward an interdisciplinary framework for research and policy making”<sup>7</sup>. The report clearly introduced three types of “information disorder”: “Mis-information is when false information is shared, but no harm is meant; Dis-information is when false information is knowingly shared to cause harm; and mal-information is when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere”<sup>8</sup>. This classification is becoming relevant within legal research but also institutionally<sup>9</sup>. The European Commission procured its own report in 2018: “A multi-dimensional approach to disinformation - Report of the independent High level Group on fake news and online disinformation”<sup>10</sup>, followed in the same year by the report “Tackling online disinformation: a European Approach”<sup>11</sup> and the Action Plan against Disinformation<sup>12</sup>, where the notion is defined as “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”<sup>13</sup>. The actions presented in the Plan are centred on transparency, communication and literacy with no specific legal actions being proposed, such as forbidding disinformation. This is reflected in the Digital Services Act proposal by the Commission in 2020 where disinformation is not considered illegal content *necessarily* and should be dealt with as harmful content resulting from the exercise of the freedom of expression<sup>14</sup>. Notwithstanding, some countries in Europe have legal provisions that foresee prohibitions of types of expression, including at a criminal level, even if a legal definition of disinformation is not adopted. Such are the cases of Austria, Croatia, Cyprus, the Czech Republic, France, Greece, Hungary, Malta, Poland, Romania and Slovakia<sup>15</sup>. Lithuania, however, was, until the recent

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7. See C. WARDLE AND H. DERAKHSHAN, *Information Disorder*.

8. Idem, *ibidem*, p. 5.

9. See R. FATHAIGH, N. HELBERGER, AND APPELMAN, N., “The perils of legally defining disinformation”, *Internet Policy Review*, 10(4), p. 4-7.

10. See EU COMMISSION, *A multi-dimensional approach*.

11. See EU COMMISSION, *Tackling online disinformation: a European Approach*, COM(2018) 236 final.

12. See EU COMMISSION, *Action Plan against Disinformation*, JOIN(2018) 36 final.

13. Idem, *ibidem*, p. 1. On this notion see, J. VAN HOBOKEN *et alia*, *The legal framework on the dissemination of disinformation through Internet services and the regulation of political advertising – Final report*, Institute for Information Law, University of Amsterdam, 2019;

14. On the distinction between disinformation as illegal content or harmful (non-illegal) content, see R. FATHAIGH, N. HELBERGER AND N. APPELMAN, “The perils...”, pp. 2-3

15. See J. VON HOBOKEN & R. FATHAIGH, “Regulating Disinformation in Europe: Implications for Speech and Privacy”, *UC Irvine Journal of International, Transnational, and Comparative Law*, 9, 2021, pp. 18-19; R. FATHAIGH, N. HELBERGER, AND APPELMAN, N., “The perils...”,

Portuguese Law no. 27/2021 of May 17<sup>th</sup>, the only EU member state that had “explicit statutory prohibition on disinformation, and specifically defines the term disinformation in its legislation”<sup>16</sup>. From the legislation of the other mentioned EU member states a notion of disinformation emerges that is somewhat in line with the EU Commission definition put forth in the Action Plan against Disinformation and that is based on three key elements: “(a) false information, (b) disseminated with a specific intention (malicious or bad faith) (c) and causes certain harms”<sup>17</sup>. The most relevant difference to the EU Commission definition regards the kind of harms produced, with significant variance within the referred countries<sup>18</sup>.

Seen from a legal perspective, disinformation, as a category of actions that instantiates the exercise of the freedom of expression, may conflict with other fundamental freedoms and rights<sup>19</sup>, from the right to vote and have free and fair elections, the right to privacy and the freedom of expression to the right to non-discrimination passing through, as currently seen during the Covid-19 pandemic, the right to health (and the duty to protect health). However malicious and harmful, disinformation is nevertheless an instantiation of the freedom of expression which raises important questions regarding how, if at all, to exempt certain types of actions from its antecedent. The European Court of Human Rights (ECtHR) has never had the opportunity to rule on a case of harm produced by the dissemination of false information with an intention to deceive the recipients but it has on several occasions decided on possible restrictions to the freedom of expression based on the dissemination of (alleged) false information<sup>20</sup>. In *Salov v. Ukraine*<sup>21</sup> the Court decided that the “Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful” (§113). This reminds us that it is up to the courts, including the CJEU and the ECtHR to determine i) if the enactment of a prohibition of disinformation is in accordance with the constitutions, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and, where a prohibition does not exist ii) what is the weight that must be attributed to a material case of disinformation that conflicts with constitutional, Charter and/or Convention norms, especially fundamental rights and freedoms.

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pp. 8 and ff.

16. R. FATHAIGH, N. HELBERGER, AND N. APPELMAN, “The perils...”, pp. 8.

17. *Idem*, *ibidem*, pp.11.

18. *Idem*, *ibidem*.

19. We are here working with a wide concept of fundamental rights’ scope which prevents or severely restricts internal or immanent limits to fundamental rights derived from interpretation. See, K. MÖLLER, “Proportionality and Rights Inflation” in G. Huscroft, B. W. Miller and G. Webber, *Proportionality and the rule of law – Rights, Justification, Reasoning*, Cambridge, Cambridge University Press, 2014, pp. 157 and ff; for a human rights conflicts’ perspective, see S. SMET, *Resolving Conflicts between Human Rights – The judge’s dilemma*, London Routledge, 2017, pp. 15 and ff.

20. See R. FATHAIGH, N. HELBERGER, AND N. APPELMAN, “The perils...”, pp. 12-13.

21. See *Salov v. Ukraine*, App no 65518/01, ECtHR, 6 September 2005.

In the present article we present the new Portuguese “right to protection against disinformation” and inquire on its deontic status and the role of the legal definition of disinformation, arguing that it is limited to calling the Portuguese Media Regulator to contribute its own reasons to limit the freedom of expression in cases where disinformation verifies and correcting the wrongful, deceitful and harmful information.

## **2. The new “Right to protection against disinformation”**

### *2.1. A right to a decision with no deontic status*

In its article 6 the recent Portuguese Law no. 27/2021, which approves the Portuguese Charter of Human Rights in the Digital Age<sup>22</sup>, refers to a “right to protection against disinformation”. Norm individuation is here a challenge. Article 6(5) foresees that “Everyone has the right to present and have complaints assessed by the Regulatory Authority for the Media against entities that carry out the acts provided for in this article, with the means of action referred to in article 21 and the provisions of Law no. 53/2005, of November 8<sup>th</sup>, regarding the complaint and deliberation procedures and the sanctioning regime”. In article 6(2) disinformation is legally defined as “any narrative that is demonstrably false or misleading created, presented and disseminated for economic advantage or to deliberately mislead the public, and which is likely to cause public harm, including a threat to democratic political processes, policy-making processes, and public goods”. Article 6(3) further develops the definition regarding the segment “demonstrably false or misleading”.

This claim-right thus seems to be the correlative of a duty incumbent upon the Media Regulator to assess and decide on matters concerning “acts” of disinformation. One important point to ascertain is if the duty imposed on the Media Regulator implies the possibility of performing any deontic change in the system<sup>23</sup>. For instance, if the Media Regulator finds that acts of disinformation were executed can the Media Regulator determine the rectification or erasure of such acts and apply sanctions? In such case, there should be, consequently, the attribution of competence to the Media Regulator necessary to fulfil the imposed duty, allowing it to receive, assess and decide the complaints but also to change the deontic status of the subjects that perform acts of disinformation. This is what we must now inquire.

Article 6(5) refers to Law 53/2005 “regarding the complaint and deliberation procedures and the sanctioning regime”. Section II of Chapter V of the Law

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22. On this Charter generally, see D. FARINHO, “The Portuguese Charter of Human Rights in the Digital Age: a legal appraisal in *Revista Española de la Transparencia*, Núm. 13, Julio-diciembre 2021, pp. 85-105.

23. See W. N. HOHFELD, “Some fundamental legal conceptions as applied in judicial reasoning”, *Yale Law Journal*, 23, 1, pp. 44 and ff; E. BULYGIN, “Norms of competence” in C. BERNAL *et alia* (ed.), *Essays in Legal Philosophy*, Oxford, Oxford University Press, 2015, pp. 273.

no. 53/2005 is titled “complaint procedures” and article 55 states that “[a]ny interested party may file a complaint regarding behaviour likely to constitute a violation of rights, freedoms and guarantees or any legal or regulatory rules applicable to social communication activities, provided that they do so within a maximum period of 30 days from the knowledge of the facts and provided that such knowledge does not occur more than 120 days after the occurrence of the alleged violation”. Article 58(1) of the same law states that “[t]he regulatory council delivers a reasoned decision, even if merely reproducing the proposal for a decision presented by the competent services, within a maximum period of 30 days from the delivery of the opposition or, failing that, the last day of the respective deadline”.

The law does not mention anywhere what content these decisions may have<sup>24</sup> which contrasts with the specific decisions foreseen in the following section of the law, titled “Right of reply, of antenna and of political reply”, where it is clear that the Media Regulator may order the publication or transmission of replies or rectifications, as well as the publication or transmission regarding the rights of antenna or political reply (article 60). Thus, it is not clear what the content of the decision regarding the complaints foreseen in article 6(5) of Law no. 27/2021 may be. We assume that the right to complain foreseen in article 6(5) refers only to the complaint procedure of articles 55 to 58 of Law no 53/2005 and not to the procedure of articles 59 and 60 of the same law<sup>25</sup>.

The lack of legal determination of the content of the decisions of the Media Regulator regarding the complaints that can be submitted seems very odd. When one analyses some recent decisions of the Portuguese Media Regulator in this domain, we find that the most common content, when the Media Regulator considers that the complainant is right, are warnings and alerts to media outlets<sup>26</sup>. These acts lack deontic status for they do not impose, prohibit or allow any conduct.

This lack of legal determination, given the referral of article 6(5) of Law 27/2021 also applies to the so-called “right to protection against disinformation” and is furthermore complicated by the circumstance that there are no sanctioning regimes applicable to the performance of acts of disinformation, as explained below.

Law 53/2005 foresees sanctioning procedures in respect to (administrative) torts of mere social order (articles 67 and following)<sup>27</sup>. Five torts are foreseen: i) refusal to collaborate (article 68); ii) refusal to allow access to inquiries and

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24. See especially article 24(3) of Law no. 53/2005.

25. In a previous paper we’ve considered the hypothesis that the referral may also be to articles 59 and 60 of Law no. 53/2005, see D. FARINHO, “The Charter”, p. 98 and ff. But, as argued in the present paper, we do not think that to be the case.

26. See *vg.* Deliberations ERC/2021/388 (CONTJOR-I), p. 8; ERC/2021/276 (CONTJOR-I), p. 9; ERC/2021/253 (CONTJOR-NET), p. 10.

27. Materially, the crime foreseen in article 66 is also a sanction but here we will consider that the referral of article 6(5) of Law 27/2021 to the “sanctioning procedure” of Law 53/2005 is made only to articles 67 and following, under the section titles “sanctioning procedures”.

exams (article 69); iii) non-preservation of records (article 70); iv) refusal to uphold a decision and v) deficient execution of a decision (article 71). Of these five torts only the last two refer to sanctions regarding “decisions”, however, according to article 71(a), (b) and (c) none of the decisions foreseen in these norm sentences comprise the kind that can be produced under article 58(1), after a complaint from an interested party.

The so-called “right to the protection against disinformation” therefore amounts to a right to have complaints assessed and decided, although without any deontic consequences, which seems to offer little (immediate) protection against disinformation.

## 2.2. *What’s in a right?*

We have seen that article 6(5) of the Law no. 27/2021 creates a duty on the Media Regulator to assess and decide complaints against entities that perform acts of disinformation but we have also seen that the decisions have no deontic status. What changes then in the Portuguese normative system with the introduction of the legal definition of “disinformation”, especially, vis-à-vis the existent right of complaint foreseen in article 55 of Law 53/2005?

The complaint procedure foreseen in article 6(5) relies on the legal definition of disinformation. Thus, this procedure mandates the Media Regulator, upon properly submitted complaints, to assess if acts of disinformation have occurred and issue decisions accordingly. Prior to article 6 of the Law no. 27/2021 the Media Regulator already had partially this duty inasmuch as acts of disinformation could be subsumed to the categories of actions foreseen in article 55 of Law no. 53/2005. The novelty is i) the extension of the subjective scope of the assessment and decision: article 55 limits the complaints to be against entities that conduct activities of “social communication” (*ex vi* article 6) whereas article 6(5) of Law no. 27/2021 foresees no subjective limitation; and also, ii) a partial extension of the material scope of complaints to integrate cases of formal disinformation not covered by a material definition verified on the subsumption to other norms. The Media Regulator must now assess the performance of acts of disinformation, as legally defined, by any entity, be they natural or legal persons.

Once the Media Regulator ascertains the execution of acts of disinformation what happens? As we have seen above, the Media Regulator does not seem to have competence to change the deontic status of the entities that perform acts of disinformation. The Media Regulator cannot prohibit or mandate the entities that perform acts of disinformation. However, as we have also seen above it can, at the least, assess if acts of disinformation were performed and it can qualify their deontic status. It seems obvious that disinformation is not mandated by any norm in the Portuguese normative system. The question is then if disinformation is (*a priori*) merely weakly permitted or if it is forbidden.

a) A prohibition of certain kinds of “disinformation”?

There is no norm sentence in article 6 explicitly using the term “forbidden” or any of its synonyms regarding disinformation and from the combination of the norm sentences of articles 6(2) and (5) alone one cannot extract a norm forbidding disinformation because an entity may have power to assess and decide complaints regarding conducts that, although not forbidden, may cause damage that must be ascertained and compensated<sup>28</sup>. The circumstance that the norm sentence of article 6(5) mentions complains “**against** entities that carry out the acts [of disinformation]” (our bold) is not conducive to the conclusion that acts of disinformation are forbidden. It might have been the intention of the legislator to imply illegality through the complaint procedure of article 6(5) but without a norm of prohibition (either explicit or implicit) referring to disinformation one cannot go beyond a mere intention with no authoritative deontic status.

Although disinformation, as a legal concept, is not explicitly forbidden some categories of disinformation are implicitly forbidden. This is so given the elements that make the legal definition: in addition to i) demonstrably false or misleading information and ii) a purpose of economic advantage or deliberately misleading the public, the legislator determines iii) the likelihood of causing “public harm”, an attribute used in several prohibitive norms of the Portuguese legal system. Public harm should be interpreted as harm directed at people as members of a political community or some of its groups, or at public assets, as illustrated by the examples given by the legislator in the definition of disinformation: “threat to democratic political processes, policy-making processes, and public goods”. For instance, many norms regarding crimes in the Portuguese penal code use attributes in the antecedent that can be interpreted as “likely to cause public harm”<sup>29</sup>. Therefore, if the other elements of the legal definition of disinformation obtain, disinformation is forbidden. This means that certain instantiations of the legal definition of disinformation refer to prohibitive norms but not the other way around. Thus, when the Media Regulator assesses complaints pursuant to article 6(5) of Law no. 27/2021, it may conclude for a specific prohibition of disinformation as a consequence of the application of a norm of prohibition that instantiates the definition of disinformation. But this is nothing new and certainly

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28. This is the very well-known case under Portuguese law of compensation for “sacrifice” foreseen in article 16 of Law no 67/2007 of December 31<sup>st</sup>: “The State and other legal persons governed by public law indemnify individuals to whom, for reasons of public interest, they impose charges or cause special and abnormal damages; in order to calculate the indemnity, account should be taken, namely, of the degree of affectation of the substantial content of the violated or sacrificed right or interest”. It is also the case within the domain of online content where a distinction between “illegal content” and “harmful content” is noted. The recent Digital Services proposal recognises this distinction, see Explanatory Memorandum (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en>).

29. See the crimes incitement to war (article 236), enticement of armed forces (article 237), discrimination and incitement to hate and violence (article 240(2)), insult for motives of religious belief (article 251), public instigation of a crime (article 297), public praise of a crime (article 298), threat of the practice of crime (article 305), incitement to civil war or the violent change of the constitutional order (article 326), incitement to collective disobedience (article 330), offense to national and regional symbols (article 332).

does not make disinformation, as an autonomous concept, illegal<sup>30</sup>.

The putative violation of such prohibitive norms by acts of disinformation may derive from the exercise of the freedom of expression so the Media Regulator must use special caution when determining if the conditions of the case are subsumed to the norm of prohibition. Also, the norm of prohibition may be unconstitutional and, in that case, under very specific conditions, the Media Regulator may waive its enforcement<sup>31</sup>.

We may conclude from the preceding analysis that the legal definition of disinformation serves no proscriptive function in the system as no norms of prohibition use it (directly) in their antecedent, although there are norms of prohibition whose antecedents may include some classes of actions that verify partially the legal definition of disinformation.

#### b) Information correction and balancing reasons

If disinformation is not explicitly proscribed by a norm referring to article 6(2) and (3) of Law no. 27/2021 on its antecedent as a limiting clause to the freedom of expression<sup>32</sup>, what is then the purpose (or the function) of the legal definition and of the new “right to protection against disinformation”? Besides the undirect prohibition of disinformation that we analysed in the previous subsection – altogether superfluous given that categories of (material) disinformation proscribed were already prohibited prior to the enactment of the legal definition of disinformation – one can conclude that the legal definition of disinformation describes a set of actions that although not prohibited is considered by the legislator as harmful and as such the Media Regulator is obliged to verify complaints vis-à-vis possible violations of norms in the system. Thus, besides the above identified function of serving as antecedent of a norm foreseeing a duty of the Media Regulator to assess and qualify cases of disinformation, the definition may work as a group of balancing reasons in favour (or not) of introducing an exception in the strong permission of expression when this freedom conflicts with other norms<sup>33</sup>.

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30. See, for comparison with European countries, R. FATHAIGH, N. HELBERGER, AND APPELMAN, N., “The perils”, pp. 7 and ff..

31. The non-application of norms by the Public Administration where it finds that they are unconstitutional is very exceptional but it is argued by some authors in the case of the protection of fundamental rights. See Parecer n.º 81/2004, of the Consultive Council of the Portuguese Republic General Prosecutor, available at <https://dre.pt/dre/detalhe/parecer/81-2004-1042693> (last access 2022.01.24).

32. See M. BOROWSKI, “Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52(1) Charter of Fundamental Rights of the European Union”, *Legisprudence*, 1, 2, pp. 197-240.

33. See M. KUMM, “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement” in G. PAVLAKOS, *Law, Rights and Discourse*, Portland, Hart Publishing, 2007, pp. 131 and ff; M. KLATT AND M. MEISTER, *The Constitutional Structure of Proportionality*, Oxford, Oxford University Press, 2012, pp. 51 and ff.

Through article 6 of Law no 27/2021 the Portuguese legislator introduced a duty of the Media Regulator to determine the existence of disinformation subject to complaint. The elements of the legal definition act as balancing reasons that the Media Regulator may use to pronounce the need for an exception to the freedom of expression. In turn, judges may use the grounds of these assessments to introduce such exceptions, when agreed with, and thus determine the removal (or online blocking) of content. Alternatively, even if the Media Regulator does not find that the freedom of expression should be limited given an inadmissible interference of disinformation over a constitutional norm but still concludes for wrongful and deceitful information it may correct the disseminated information, for instance on its website or on a dedicated website<sup>34</sup> This grants an interesting function to the right foreseen in article 6(5) within the Portuguese legal system. The Media Regulator in practice can issue opinions on disinformation that may be used to correct (dis)information and to ground ulterior judicial decisions. The former function leads to a focus on procedure and especially on time, to make sure that information correction is provided with speed and prevents as much harm as possible but does not contend with the exercise of the freedom of expression<sup>35</sup> and it has limited success in protecting against disinformation, as people who believed the false information will show a tendency to resist correction or any kind of clarification<sup>36</sup>. Let us now elaborate further on the latter function.

Bulygin makes an interesting distinction between “compliance with and application of a norm”<sup>37</sup>. He goes on to state that “The idea that legal norms can only be complied with or not complied with is presupposed, *sub silentio*, by virtually all normative theories of law, while the fact that legal norms can also have other functions is either overlooked or, indeed, not sufficiently appreciated. A norm can not only be complied with however, it can also be used. If a norm is used, for example, to justify or to criticize an action, this is entirely different from compliance with an imperative, and the norm is functioning in an altogether different way. If the judge applies a norm, he is using this norm in order to ground his decision, but it would be misleading to describe this as compliance with the norm”<sup>38</sup>. As we have seen the definition of disinformation derived from article 5(2) and (3) of Law no. 27/2021 does not call for compliance. As a legal definition it could only call for indirect compliance through use in the antecedent of a regulative norm, for instance a prohibition. Bulygin has this to say on the subject of legal definitions regarding this matter: “As already established, not all legal norms call for compliance. Legal norms can be complied with only if they prescribe (command or forbid) certain behaviour— that is, they render an action or a forbearance obligatory. Thus, not all sentences characterized in ordinary legal discourse as legal norms are in fact norms if, by ‘norm’, one understands

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34. On information correction as a regulatory approach to disinformation see, R. HELM AND H. NASU, “Regulatory Responses to ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation”, *Human Rights Law Review*, 2021, 21, pp. 315 and ff.

35. R. HELM AND H. NASU, “Regulatory Responses”, p. 317.

36. See R. HELM AND H. NASU, “Regulatory Responses”, p. 317; D. FARINHO, “The Charter”, p. 101, footnote 32.

37. E. BULYGIN, “The Concept of Efficacy” in C. BERNAL *et alia* (ed.), *Essays*, p. 42.

38. *Idem*, *ibidem*, p. 42

a regulation or a directive. It seems, then, more reasonable to confine the expression ‘legal norm’ to directives and to characterize those legal definitions that are not directives as ‘legal rules’, similar in terms of function to the rules of a game or the rules of grammar or logic. The expression ‘legal rule’ would encompass approximately those legal definitions that Hart calls ‘secondary rules’<sup>39</sup>. What is then the function of the legal definition of “disinformation”? Besides setting the material scope of a new duty of the Media Regulator, it is a rule that adds reasons to the set of reasons balanced by the Media Regulator and judges when applying the principle of proportionality in order to assess and/or solve a conflict between the freedom of expression and other norms when no norms of conflicts are available. Although the judges will not “use” the legal definition of disinformation in a Bulyginian sense<sup>40</sup>, the Media Regulator will, for its decisions will be “grounded” on the definition<sup>41</sup>. Even so, judges may be “motivated”<sup>42</sup> by the legal definition and the decisions of the Media Regulator to adjudicate cases of conflicts between freedom of expression/disinformation vs. constitutional norms. We will elaborate on this presently.

In the Portuguese case, as is normal in legal systems with a constitutional basis, the constitutional legislator inscribed freedom of expression among the catalogue of fundamental rights and freedoms. Thus, in article 37 of the Constitution, intitled “Freedom of expression and information”, begins our journey to better understand the role of the legal definition of disinformation as balancing reasons.

Article 37(1) foresees that “Everyone has the right to freely express and disclose their thoughts through word, image or any other means, as well as the right to inform, to inform themselves and to be informed, without hindrance or discrimination”. In the Hohfeldian tradition we can extract from this norm sentence a claim-right to not having the expression hindered or discriminated<sup>43</sup>, besides a special norm of freedom of expression regarding the permission to inform, as a special case of expression. The liberty can be derived from the normative statement up until “other means” and the claim-right can be derived from the segment “without hindrance or discrimination”. This is further reinforced by the normative statement of article 37(2).

As a strong permission, “freedom of expression” allows everyone to express themselves or to refrain from doing so, but most importantly, following Bulygin and Alchourrón<sup>44</sup>, it limits the competence of the legislator to prohibit any kind of expressions that the constitutional legislator has not allowed the ordinary legislator to prohibit in a certain manner.

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39. *Idem*, *ibidem*, p. 42-43.

40. *Idem*, *ibidem*.

41. *Idem*, *ibidem*, p. 42 and ff.

42. *Idem*, *ibidem*, p. 47.

43. It is also a Bulyginian strong or positive permission. See below.

44. E. BULYGIN AND C. ALCHOURRÓN, “Permissory Norms and Normative Systems” in C. BERNAL *et alia* (ed.), *Essays*, pp. 324 and ff. In a similar fashion, see J. RAZ, *The Authority of Law – Essays on Law and Morality*, Oxford, Clarendon Press, 1979, p. 65.

As a claim-right “freedom of expression” is the correlative counterpart to a duty addressed at everyone not to hinder or discriminate the expression of someone<sup>45</sup>.

The individuation of the norms that foresee the “freedom of expression” is not yet complete however. The norm sentence of article 37(3) must be taken into consideration. It states: “Violations committed in the exercise of these rights are subject to the general principles of criminal law or the tort of mere social order, and their assessment is respectively within the competence of the judicial courts or of an independent administrative entity, under the terms of the law”. This norm sentence contains three norms. First a norm prescribing an obligation addressed at the State mandating that “violations” committed in the exercise of the freedom of expression be submitted to the principles of criminal law or the tort of mere social order and two norms conferring power, one to the courts and another to an independent administrative body, to adjudicate the cases of possible violations to the freedom of expression. The first norm contained in article 37(3) presupposes the existence of limits to the freedom of expression inasmuch as “[v]iolations committed in the exercise of these rights” are admitted<sup>46</sup>. These are limits foreseen by the legislator as exceptions to the strong permission set out in article 37(1). This means that the legislator can, in effect, limit the freedom of expression as long as it follows the constitutional demands of article 18(2) and (3), and 37(3)<sup>47</sup>.

Thus the “freedom of expression” as a legal category comprises two primary legal positions:

(1) Everyone can *prima facie* express anything (article 37(1)), except regarding the matters excepted by the legislator following articles 18(2) and (3), and 37(3) or by a judge regarding a specific instantiation of a normative conflict between this strong permission and another norm when there is no norm of conflicts.

(2) Everyone has a duty to not hinder, discriminate or censure the expression of everyone else, except where the legislator introduces an exception following articles 18(2) and (3), and 37(3) or the judge introduces an exception regarding a specific instantiation of a normative conflict between this strong permission and another norm when there is no norm of conflicts.

The legal definition of “disinformation” may provide decisive reasons in favour of exempting such class of actions from the antecedent of the freedom of

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45. The norm sentence of article 37(1) also allows to extract other norms resulting in strong permissions and rights: a permission for people to inform themselves and a claim-right to be informed. These will not interest us in the present paper.

46. J. CANOTILHO AND V. MOREIRA, *Constituição da República Portuguesa anotada*, Vol. I, Coimbra, Almedina, 4.<sup>a</sup> edição, 2007, p. 575.

47. This also means that the prohibition contained in the norm sentence of article 37(2) – “The exercise of these rights cannot be impeded or limited by any type or form of censorship” – when its addressee is the legislator, is partially redundant, as it follows from the strong permission that if the legislator does not have the competence to impose exceptions to the permission it is forbidden to censor as any censorship amounts to an exception to the permission of expression (the denial of expression).

expression, as described in (1) and (2) above<sup>48</sup>. Let us consider the following case: Mr. Nolaw has a social media account with followers who amount to a fourth of the population of Portugal. He posts a text demonising vaccination against Covid-19, stating that it doesn't reduce the severity of the symptoms, that it does not prevent any deaths and that it will in fact cause the death of 5 in every 10 people who get vaccinated. Thus people should not be vaccinated. Mr. Nolaw knows that this is not the case but since he has an ideological position of principle against vaccines, he wishes to lead people into not being vaccinated, which can cause the death and serious injuries to many people and serious problems to the health system of his country. In response to his post more than a hundred thousand people in just 24 hours have liked it or otherwise commented his publication saying they will not get vaccinated. Ms. Lawful is a concerned citizen who files a complaint before both the Media Regulator and the social media entity asking for the publication of Mr. Nolaw to be removed from the platform given its status as disinformation. The Media Regulator finds the post to be disinformation and publishes a warning and a rectification on its website and the online platform removes the post. Mr. Nolaw files a law suit against the online platform for violation of his freedom of expression. The social media company replies by invoking its freedom of enterprise and the protection of public health. The judge considers this a case of conflict between the freedom of expression and the right to protect public health (see article 52(3)(a) of the Portuguese Constitution). Since the legal definition of disinformation depicts a case of harmful although not illegal exercise of the freedom of expression, can the judge use it when balancing reasons under the principle of proportionality? Can it use the Media Regulator assessment of such reasons? And, more importantly, do such balancing reasons have a distinct weight when compared to the same definition if it were not legal but merely doctrinal or personal?

Some sort of balancing and weighing is the dominant approach to the resolution of normative conflicts of the partial-partial kind<sup>49</sup>, typical of constitutional norms, especially fundamental rights and freedoms, under the principle of proportionality<sup>50</sup>. This is the case in Portugal<sup>51</sup> and it is also the case in the above example, where an instantiation of the freedom of expression is deemed to conflict with two norms, one permitting free enterprise, inasmuch as the online platform may decide to remove Mr. Nolaw content, and another forbidding harm

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48. See E. BULYGIN, "Judicial Decisions and the Creation of Law" in C. BERNAL *et alia* (ed.), *Essays*, p. 83.

49. This is the case for most constitutional and human rights courts, as is the example of the European Court of Human Rights. See; *Big Brother Watch and Others v. The United Kingdom*, App no. 58170/13, 62322/14 and 24960/15, ECtHR 25 of May 2021; *Bédat v. Switzerland*, App no. 56925/09, ECtHR 29 of March 2016; *Animal Defenders v. The United Kingdom*, App no. 48876/08, ECtHR 22 of April 2013. On the balancing approach used by the ECtHR regarding freedom of expression, see A. SARDO, "Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights", *Canadian Journal of Law & Jurisprudence*, XXXIII, No. 2, 2020, pp. 438 and ff; for an extensive case analysis see M. KLATT AND M. MEISTER, *The Constitutional Structure*.

50. See article 52 of the EU Charter of Fundamental Rights;

51. See recent decisions 687/21, Process No. 830/2021, Portuguese Constitutional Court; 464/19, Process No. 26/18, Portuguese Constitutional Court.

to public health, inasmuch as everyone has a claim-right against everyone else to safeguard public health. Let's focus on this last conflict. The judge will look at the features of each instantiation of the conflicting norms. It will have, on one side an instantiation of the freedom of expression which the legislator designates by "disinformation" and which it deems harmful but not forbidden and on the other side an instantiation of a likely violation of public health. In this case the conflict is framed as a harmful use of the freedom of expression that restricts the deontic status of the duty to safeguard health. The judge must thus provide reasons for this instantiation of the freedom of expression to prevail over the duty, acting as an exception, as well as reasons for the instantiation of the duty to prevail and act as an exception to the freedom of expression. Finally, the judge must balance both sets of reasons and decide which of the norms prevails. It seems straightforward that, independently of the specific process of balancing adopted pursuant to the principle of proportionality, which is considered binding on the Portuguese courts when adjudicating this kind of conflicts, the category of instantiations of the freedom of expression termed by the legislator "disinformation" describes a set of instantiations that the judges were already at liberty to qualify prior to the existence of the legal definition of disinformation. This means there is no norm assigning a specific weight to disinformation (as a type of instantiation of the freedom of expression) due to its legal definition. As such the judges have discretion to assign disinformation, i.e. to each of its three composing elements, the weight they consider justified within the limits of rational practical discourse<sup>52</sup>. This also means that the prior assessment that the Media Regulator performs under article 6(5) of Law no. 27/021, using the same balancing reasons, may be of use to the courts, depending on how it values such reasons within the above referred rational practical discourse.

### **3. Final remarks regarding a legal status on disinformation**

The new Portuguese "right to protection against disinformation" turns out to be a right to complain, with no other deontic consequences attached apart from the duty of the Media Regulator to respond. The enactment of a legal definition of "disinformation" serves the purpose of framing the legitimacy of the complainants and the competence of the Portuguese Media Regulator. Even the composing elements of the definition cannot be said to be reasons with any particular weight that may assist the judge in balancing when a conflict with another constitutional norm arises. They are indeed reasons – (the lesser value of) false information in most contexts; (the residual value of) deceit of the recipients of the information and the consequences thereof, such as lack of trust; (the unwanted) public harm to groups of people and public goods – but such reasons can be gathered and

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52. See, R. ALEXY, *Theorie der juristischen Argumentation*, Frankfurt, Suhrkamp, 2nd edition, 1990, pp. 254 and ff; D. DUARTE, "From Constitutional Discretion to the Positivist Weight Formula", in J-R SIECKMANN (ed.), *Proportionality, Balancing, and Rights*, Cham, Springer, 2021, pp. 11 and ff; in particular on the role of reasons on external justification see J. SAMPAIO, "Brute Balancing, Proportionality and Meta-Weighing of Reasons", in J-R SIECKMANN (ed.), *Proportionality, Balancing, and Rights*, Cham, Springer, 2021, pp. 49 and ff.

justified by any judge within their discretion. What we are left with is not so much the full “protection against disinformation” but a possibility to have disinformation corrected and to have better adjudication of disinformation. This is so because the right foreseen in article 6(5) of the Law no. 27/2021 will amount to assessments of instantiations of the legal definition of disinformation that will produce a body of reasons, arguments and justifications for cases where disinformation verifies. If done in a thorough and rigorous way, supported by strong legal arguments and in dialogue with other EU institutions and courts, the decisions of the Portuguese Media Regulator can serve two important purposes: i) correct disseminated information through offering a correct account of facts; and ii) serve as an important set of materials to be used by the courts in grounding their decisions concerning the exercise of the freedom of expression. It is, after all, to the courts that falls the task to protect people and institutions against disinformation, in the absence of a preliminary binding decision by administrative authorities. Far from the dangers of censorship and attacks to the freedom of expression, an enlightened action by the Media Regulator under the regime foreseen in article 6(5) of Law no 27/2021 can serve an important purpose, in between self-regulation and judicial adjudication<sup>53</sup> of the freedom of expression, enriching the landscape of legal responses to disinformation<sup>54</sup>. The Media Regulator must act with high standards and diligence. Information correction, notwithstanding its limitations, is important in itself<sup>55</sup> but a legal appraisal of restrictions that should be imposed on the freedom of expression due to the harm caused by disinformation further enhances the role of the new right to complaint against disinformation, especially given the dialogue with the judicial power that may ensue. By not making disinformation illegal, the Portuguese option takes a balanced road and still leaves the door open for stronger measures in the future, if need be. The experience gathered from the future DSA will be critical in this domain as disinformation is also considered not illegal under the proposal and will be subjected to balancing operations when colliding with other norms<sup>56</sup>, in a similar fashion to what already happens in Germany under the NetzDG, Network Enforcement Act<sup>57</sup>.

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53. See A. CALLAMARD, “Are courts re-inventing Internet regulation?”, *International Review of Law, Computers & Technology*, 31, 3, pp. 323-339.

54. C. MARSDEN, T. MEYER, I. BROWN, “Platform values”, p. 9-11.

55. C. WITTENBERG AND A. J. BERINSKY, “Misinformation and Its Correction” in N. PERSILY AND J. A. TUCKER, *Social Media and Democracy – The State of the Field, Prospects for Reform*, Cambridge, Cambridge University Press, 2020, p. 163 and ff;

56. On the DSA proposal and its tools to fight disinformation see R. FATHAIGH, N. HELBERGER, AND APPELMAN, N., “The perils”, p. 15 and ff.

57. See T. WISCHMEYER, “‘What is illegal offline is also illegal online’: the German Network Enforcement Act 2017” in B. PETKOVA AND T. OJANEN, *Fundamental Rights Protection Online – The Future Regulation of Intermediaries*, Cheltenham, Edward Elgar Publishing, 2020, p. 32 and ff.

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